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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF MID-AMERICA LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING THE POSITION OF PETITIONER

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF OF MID-AMERICA LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING THE POSITION OF PETITIONER

Mid-America Legal Foundation ("Mid-America") moves the Court for leave to file the accompanying Brief as amicus curiae in support of the captioned petition for a writ of certiorari, as well as the related petitions filed by Chevron U.S.A., Inc. in Docket No. 82-1005 and by American Iron and Steel Institute et al. in Docket No. 82-1247.

The Solicitor General, counsel to petitioner, has consented to this filing. His written consent is filed with the Clerk of the Court. Counsel to certain respondents have not consented, thereby necessitating this motion.

Mid-America was organized in 1975 to engage in legal research, study and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions. Mid-America takes special interest in issues of a national scope that originate in or have a direct effect on the mid-America region, namely Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin. Mid-America has an interest in this case because the region is one of the most important manufacturing areas of the Nation.

In the accompanying brief, Mid-America as amicus curiae presents data from the Harvard Business School case study of an air pollution control program utilizing the "bubble" concept at the Middletown, Ohio steel plant of Armco, Inc. In announcing the expected approval of the plan by former Administrator, Douglas M. Costle, EPA stated that, "Armco's 'bubble' dust control plan would eliminate 4,000 tons per year of

particulate as compared to 652 tons per year under existing regulations."

Amicus presents the empirical evidence and analysis set out in the Harvard study to advance two points in support of the petitions for a writ of certiorari.

First, there is no inconsistency between the "bubble" concept and either the language of the Clean Air Act, 42 U.S.C. § 7401 et seq. (the "Act") or the purpose of Congress in bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part D of the Act. In fact, as the Harvard study demonstrates, considerably greater improvement in air quality may be achieved with the bubble concept than without it.

Second, absent such inconsistency, the policy decision of the Administrator of the Environmental Protection Agency to approve state implementation plans which permit use of the bubble concept and otherwise meet the requirements of the Act, as reflected in the challenged regulation, must be sustained.

In the brief, Mid-America urges the Court to grant the petitions for a writ of certiorari because the

court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court and has done so in a way in conflict with Batterton v. Francis, 432 U.S. 416 (1977), and Train v. NRDC, 421 U.S. 60 (1975).

Accordingly, Mid-America requests leave to file the accompanying brief as amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus is set out in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The court of appeals has invalidated regulations of the Environmental Protection Agency which allowed

the application of a "bubble" concept to new source review requirements in areas which have not attained the national ambient air quality standards under the Clean Air Act, 42 U.S.C. § 7401 et seq. (the "Act"). It did so by ruling that the "bubble" concept is incompatible with those provisions of the Act which have the purpose of improving rather than maintaining air quality. The court of appeals thereby decided an important federal question which has not been, but should be, settled by this Court and did so in a way in conflict with Batterton v. Francis, 432 U.S. 416 (1977), and Train v. NRDC, 421 U.S. 60 (1975).

First, there is no inconsistency between the "bubble" concept and either the language of the Act or the purpose of Congress in bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part D of the Act, 42 U.S.C. § 7501 et seq. In fact, as the Harvard Study presented herein demonstrates, considerably greater improvement in air quality may be achieved with the bubble concept than without it.

Second, absent such inconsistency, the policy judgment of the Administrator of the Environmental

Protection Agency, reflected in the challenged regulation, must be sustained. Contrary to the decision of the court of appeals in this case, ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C. Cir. 1978), did not hold otherwise and cannot be controlling here.

ARGUMENT

I. Use of the "bubble" concept is consistent with the improvement of air quality.

There is no incompatibility between the "bubble" concept and either the language of the Clean Air Act or the legislative purpose of bringing all air quality regions of the United States into compliance with the national ambient air quality standards pursuant to Part D of the Act. In fact, use of the "bubble" concept in nonattainment areas not only may achieve greater air quality improvement than the stack by stack approach, but may also speed up the achievement of clean air standards in nonattainment areas. This was demonstrated in the case study of an air pollution control program at the Middletown, Ohio steel plant of

Armco, Inc. which was prepared for class discussion at the Harvard Business School.[1]

> The Middletown plant site produced 3 million tons of steel yearly, covered 2,600 acres, employed roughly 7,000 people, and stockpiled (depending on the season) something on the order of 670,000 tons of raw materials. Its various operations were well monitored by the EPA. Even though measurements at only one of the monitoring stations on the periphery and in the vicinity of the plant exceeded the primary TSP ambient air standard of 75 ug/m^3 (micrograms per cubic meter, a measure of density), that single station resulted in the Middletown area's being designated a "nonattainment" area.

Harvard Study Part A, at 1 (exhibits and footnotes omitted).

To deal with Armco's problem and others like it, Congressional hearings and a White House conference were held. In addition, Anthony Solomon, Undersecretary of the Treasury for Monetary Affairs, chaired a special task force on industry problems whose recommendations appeared in a December, 1977

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[1] A. Kantrow, D. Dyer and J. Fox, Armco and the Bubble Policy, (1981) (distributed by HBS Case Services, Harvard Business School, Boston, Massachusetts 02163) (hereinafter cited as the "Harvard Study").

report, A Comprehensive Program for the Steel Industry. Seeking a middle ground between "environmental animus and industry complaint," the Solomon Committee recommended that government and industry cooperate in a study of new solutions to the problems of pollution control. Harvard Study at 2.

> Emissions standards, as then fixed by legislation, generally applied on a process-by-process basis to each individual stage of the steelmaking operations. They also applied, on a point-by-point basis, to individual sources of pollution. As a result, plants in violation of ambient air standards for total emissions could not remedy the situation merely by undertaking that mix of corrective actions that would have the greatest immediate effect on overall ambient air quality. Even though the problem had to do with the general level of TSP emissions, corrective action had to be addressed to specific contributory sources - whether or not they were responsible for the bulk of the problem.

Id. at 5.

Several flaws were thought to be implicit in the logic of this existing environmental regulation. For example:

> To those who, following the technology-forcing legislation, viewed abatement activity primarily in terms of individual process- or point-TSP emissions, the only appropriate measure of success was the absolute level of TSP reduction per individual source. If 80% of a given smokestack's emission could be

kept out of the atmosphere, 90% was even better, and 100% ("zero emissions") was best of all. At one level, of course, this was pure common sense; at another, however, it was profoundly misleading, for to think in these terms was to ignore the fact that each additional increment of pollution reduction costs a good deal more than the previous one. In other words, to achieve the last tiny marginal improvement in ambient air quality for a given smokestack - an improvement which, when measured in absolute TSP reduction, is insignificant - is far more expensive than to achieve gross TSP reductions for other pollution sources. For example, the first 95% of TSP reduction for an electric furnace cost 3.5¢/lb.; the next 4%, 30¢/lb.; and the final 1%, $35/lb.

Also implicit in the accepted regulatory logic, Armco felt, was the notion that all forms of pollution control employ roughly equivalent amounts of energy. In other words, the specific EPA standards, as they stood, made no allowance at all for the differential consumption of energy. [Armco's director of environmetnal engineering] thought this both narrow-minded and self-defeating: narrow-minded because energy, like clean air, was a finite good, meriting conservation; self-defeating because the production of usable energy itself entailed a certain predictable level of air pollution. There was a law of diminishing returns in control activity, a point beyond which the production of energy needed for incremental control created more emissions than it removed. For example, "To produce the electricity to run the fans and motors to clean up the scarfing machine [at the Kansas City plant] meant that the local power plant would produce more pollution than we will capture."

Id. at 6-7 (exhibits and footnotes omitted).

In seeking alternatives to this type of self-defeating regulation, EPA hired the Midwest Research Institute to develop a scientific basis for accurately estimating pollution from open dust sources. By 1978, the Institute had perfected a series of emissions factor equations for doing so. These equations made possible for the first time a full inventory of pollution sources. This test, using a methodology called "exposure profile sampling" yielded the following results at Armco's Middletown plant.

> Contrary to expectations, roughly 60% of particulates came neither from stack nor process emissions but, instead, from open dust sources. Even when differential particle size was taken into account, the result remained pretty much the same. For all particulates less than 30 um (microns), open dust emissions were six times greater than process fugitive emissions, which were the focus of EPA concern. For particulates less than 5 um (the size most responsible for ambient air quality more than 1 mile from an industrial site), open dust emissions were still three times greater than process fugitive emissions.
>
> Given these figures [Armco officials] realized that "there [was] very little room for further reduction [in TPS levels] from presently controlled sources by adding more efficient controls." To attack the remaining smokestack or process emissions would be to direct Armco's efforts toward a relatively minor part of the problem. . . .
>
> . . .To cite the most striking example, controlling windblown emissions from raw

materials piles would remove 284 tons of particulates from the air each year (a reduction of some 60%) at a capital cost of $200,000 - or $704 per ton - and with an energy expenditure of 46 KWH per ton. By contrast, controlling fugitive emissions from open hearth operations would remove only 64 tons of particulates from the air each year (a reduction of 80%) at a capital cost of $4,000,000 - or $63,992 per ton - and with an energy expenditure of 179,700 KWH per ton. These were staggering numbers indeed. By focusing efforts on open dust instead of process fugitive sources, Armco could get more particulates out of the air at 1/89th the cost per ton and with 1/3906th the energy.

Id. at 8-9 (exhibit and footnote omitted).

After much study and on-site monitoring of a pilot project at the Middletown plant, EPA announced the expected approval of Armco's specific bubble plan by EPA Administrator, Douglas M. Costle. In a press release issued on October 20, 1980, EPA stated:

> 'It is our judgment that Armco will be able to satisfy the "bubble" requirements and EPA will be able to act favorably on Ohio's State Implementation Plan for the area affected by the plant when it is submitted by the State,' Costle said.
>
> . . . .
>
> . . .A joint air monitoring study by federal, state and local governments and Armco has confirmed in a pilot project that this bubble is effective and has resulted in significant improvements in air quality.
>
> Armco's 'bubble' dust control plan would eliminate 4,000 tons per year of

particulates as compared to 652 tons per year under existing regulations.

Harvard Study, Part D, Ex. 2, p.2-3 quoting EPA "Environmental News." (emphasis added).

Following submission of the required technical support documents, EPA formally proposed the conditional approval of the Ohio plan on January 27, 1981, 46 Fed. Reg. 8683, and gave that approval on March 31, 1981, 46 Fed. Reg. 19468. The Harvard Study and the data obtained by EPA in support of the Ohio plan illustrate that a policy which allows use of the "bubble" concept may provide significantly greater improvement in air quality than a contrary policy which precludes it.

In addition to providing greater improvements in air quality, the bubble policy may speed up the achievement of clean air standards because it enables firms operating the sources of air pollutants to revise their control policies to achieve the most cost effective method of meeting the requirements of the Act. Plant engineers may turn their sights to inventing new and more effective pollution control devices.

> Traditional 'command and control' regulations may actually deter the development of new

> technology because firms, fearing that new items of capital equipment will be specifically required, may hide information about more effective means of pollution reduction. By contrast, the bubble would serve as an incentive for developing cost-effective pollution control technology since, when not forced to use particular technologies, a buyer will choose the least expensive means of satisfying emissions limitations. Comment, An Overview of the Bubble Concept, 8 Colum. J. Envtl. L. 137, 155 (1982).

Some have voiced concern that use of the bubble might allow the reduction of less harmful emissions as a tradeoff for not reducing more hazardous air pollutants. This objection is not well-founded. The equivalence of tradeoffs may be addressed directly. Limitations designed to ensure that the facility-wide definition of stationary source is used to improve air quality and meet other requirements of the Act are not incompatible with the bubble concept. See EPA's Widening Embrace of the Bubble Concept: The Legality and Availability of Intra-Source Trade-Offs, 9 Envtl. L. Rep. 10027, 10029 (1979).

Thus, since the use of the bubble concept has been shown to be capable of improving air quality, use of the bubble in nonattainment areas is not

inconsistent with the purpose of Congress in enacting Part D of the Act.

II. The policy judgment of the Administrator was rejected in a way in conflict with Batterton and Train.

It is well established both by principles of administrative law and the decisions of this Court that in the absence of a conflict between the policy judgment of an agency administrator charged with responsibility for implementing a federal statute and either the language or purpose of that act, the agency decision must be sustained. See Administrative Procedure Act, 5 U.S.C. § 706; Batterton v. Francis, 432 U.S. 416 (1977); and Train v. NRDC, 421 U.S. 60, (1975). In the decision below, that principle was turned on its head when the court of appeals substituted its judgment for the policy decision of the EPA Administrator to approve state implementation plans allowing the use of a bubble concept which is based on the language of the Act itself. A facility-wide definition of "stationary source" in the verbatim language of Section 111 of the Act, 42 U.S.C. § 7411, was the regulatory mechanism

utilized by EPA to authorize the "bubble" concept for the nonattainment provisions of Part D of the Act.

The presumption in favor of the agency's policy judgment is based on practical concerns about the proper utilization of agency expertise. As noted in Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978):

> The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the construction and administration of a given statute or its predecessors. Where, as here, the agency has extensive experience, has relied on the common meaning of the relevant statute's specific language, and can point to important congressional purposes furthered by its interpretation, only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations.

The special competence of EPA to interpret its mandate under the Clean Air Act is well recognized. In Train, this Court sustained an EPA regulation as "sufficiently reasonable" without going so far as to hold that such construction was "the only one it permissibly could have adopted," 421 U.S. at 75.

This Court also noted that judicial review should allow a proper degree of flexibility for administrative proceedings:

> The fact that the interpretation placed on the section by the Agency may on occasion require administrative flexibility and ingenuity to a greater degree than would a more rigid alternative is not, of course, a reason for rejecting the Agency's otherwise reasonable construction.

421 U.S. at 94 n. 28.

The limitations on judicial review of administrative action were reiterated by this Court in Batterton. The Secretary, similar to the EPA Administrator, was delegated authority by Congress to prescribe standards in order to accomplish the purposes of the Act. This Court stated the applicable principle of law as follows:

> In a situation of this kind, Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

432 U.S. at 426.[2]

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[2]Here, the court of appeals noted specifically that "EPA, it is not disputed, has authority to define the constituent terms of source enumerated in the statute ('building, structure, facility or installation') in a

Under these circumstances, where there is no conflict with the language of the Act, the legitimate inquiries a reviewing court should make are whether the administrator "exceeded his statutory authority" and whether the "regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 426. The decision below clearly failed to do so. As a result, the court of appeals substituted its judgment for the policy judgment of the EPA Administrator in the absence of any conflict with either the language or the purpose of the Act. It did so by relying solely on the prior decision in ASARCO, Inc. v. EPA, 578 F.2d 319 (D.C.Cir. 1978), as having established that the bubble concept is inconsistent with the improvement of air quality.[3] ASARCO, however,

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manner that will best effectuate the expressed purposes of the Act." 685 F.2d at 723 n. 22; Chevron Pet. Cert. Appx. at A-9 n. 22.

[3]685 F.2d at 727-28; Chevron Pet. Cert. Appx. at A-16-17. "We express no view on the decision we would reach if the line drawn in Alabama Power and ASARCO did not control our judgment." 685 F.2d at 720 n. 7; Chevron Pet. Cert. Appx. at A-4 n.7. Alabama Power Co. v. Costle, 636 F.2d 323 (D.C.Cir. 1979), mandated a bubble concept under Part C of the

did not hold that the bubble concept is incompatible with improving air quality.[4]

The regulation involved in ASARCO sought to redefine the statutory term "facility" in Section 111 of the Act to mean "a combination of such units." 578 F.2d at 327. This was rejected as "inconsistent with the language of the Act." Ibid. The ASARCO court clearly stated that its consideration of "the purpose of the Clean Air Act and Section 111" merely "reinforced" the decision which was based on this conflict between the language of the regulation involved in that case and the language of the Act. Ibid. No such conflict is present in this case. The regulation here at issue incorporates the relevant statutory language verbatim. It does not redefine "facility" or any other statutory

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Act, 42 U.S.C. § 7470 et seq., for areas which have attained the national ambient air quality standards.

[4] Amicus here assumes arguendo that ASARCO was correctly decided on its own terms. The alternative argument that ASARCO should not be controlling here because it was incorrectly decided and conflicts with Alabama Power, must also be noted. See Chevron Pet. Cert. pp. 7-10.

term.[5] Accordingly, since the basis of the ASARCO decision is completely inapplicable to this case, it cannot be controlling here.

The reinforcing dictum of ASARCO that the bubble concept is inconsistent with "the purpose of the Clean Air Act and Section 111," could not and did not hold that the different application of the differently worded bubble concept which the Administrator here adopted for Part D of the Act is inconsistent with the improvement of air quality.[6] By ruling otherwise, the court below failed to make even one of the rulings or findings required to set aside the action of the Administrator under the Administrative Procedure Act, 5 U.S.C. § 706. Policy decisions of an agency are "entitled to more than mere deference or weight" and

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[5] ASARCO expressly noted that, in proper circumstances, the statutory term "facility" could cover an entire plant. 578 F.2d at 324 n. 17.

[6] 578 F.2d at 327-30 (emphasis added). Even if it had done so, such a conclusion would be subject to reconsideration as inconsistent with the factual data subsequently developed by EPA, including the measurement techniques developed for EPA by the Midwest Research Institute and the joint monitoring study at Middletown. See pp.6-8 supra.

can be set aside only if the Administrator "exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 432 U.S. at 426.

CONCLUSION

The Court below has decided an important question of federal law which has not been, but should be, settled by this Court and has done so in a way in conflict with the decisions of this Court in Batterton and Train.

For these reasons and the reasons set forth in the petitions, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

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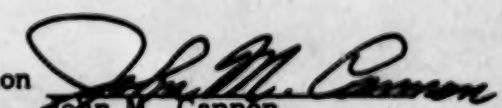
Respectfully submitted,



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